

BRIEF SUPPORTING PETITION.**Introduction.**

The dairy problem of New York State has been a matter of public and legislative concern for many years. This court is already familiar with the problems of the milk industry and has treated many of its different phases.

Nebbia v. New York, 291 U. S. 502;

Baldwin v. Seelig, 294 U. S. 511;

Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251;

Hegeman Farms Corporation v. Baldwin, 293 U. S. 163.

Those cases arose before milk marketing orders promulgated under the provisions of the Agriculture Marketing Agreement Act of 1937. Several issues born of these orders, too, have passed before this Court. In all of these cases, however, the issue of this case has not been considered. The petitioner does not attack Order No. 27; it does not attack the order method of marketing milk. It seeks to have corrected inequalities arising between a minority group and the majority group under the operation of a milk marketing order. It is an endeavor to correct inequalities which have arisen between producers under the operation of a milk marketing order. Petitioner claims that it is entitled to a differential in its favor to compensate it to some extent for the "grade or quality of its milk."

In United States vs. Rock Royal Cooperative, Inc., 307 U. S. 533, extensive briefs were filed by the United States. One statement contained in the brief on behalf of the United States clearly analyses the nature of the grievances to which we are here seeking to direct the attention of this court. At page 126 of the United States brief in the Rock

Royal case, in general justification of the equalization provisions of the order, the government said:

"The equalization payments are essentially fair because they provide for a mutuality of burdens and benefits. Their effect is to give all producers a share of the valuable fluid milk market commensurate with the quantity of milk they deliver and at the same time to enable all producers to bear equally the burdens incident to the inevitable and necessary surplus. A statutory provision which treats all producers with equal fairness, assures them a stable price, protects them from the hazards which have proved so harmful to their welfare in the past, and distributes the necessary burdens of the business equally and fairly among them all does not violate the due process clause of the Fifth Amendment."

But at page 60 and 61 of the same brief, in a justification of payment in excess of the equalized price to producers covering local differentials, the government also said:

"The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential."

Petitioner claims that it also has always enjoyed an almost exclusively fluid market, not by reason of accident of competition but by reason of natural advantages inherent in its product, and hence that it is deprived of its property without due process of law when required to market this product on an equalized basis without regard to the grade or quality of its product and without just compensation by way of a differential.

A. Equalization in secretary's order No. 27 deprives petitioner of property without due process of law.

1. PROPERTY RIGHTS INVOLVED IN PRODUCTION OF GUERNSEY MILK.

The production of Guernsey milk today is the result of costly concern for the careful breeding of herds and a planned evolution of the high test dairy cow. It is the product of sizeable investments in equipment and of expensive herds formed and improved through the persistence of farmers endeavoring to offer something better on the milk market. That market has been developed through vigorous advertising, an expense incurred and designed to yield long term profit.

Guernsey milk's high butterfat, yellow color, richness in protein and minerals are upheld through heavier stoking of feed per unit of milk produced.

"It is an established fact that feed costs and other expenses of production are greater per hundred weight for high-test milk than for milk of lower fat content. According to the Morrison Feeding Standards for dairy cows, it takes about 7 pounds more of total digestible nutrients to produce 100 pounds of 4.5 per cent milk than to produce the same quantity of 3.5 per cent milk."¹

In addition to investment, maintenance, and current feeding and care costs, and as their result, the contents of Guernsey milk represent special property rights of the petitioner. Of 100 pounds of average milk, 87 are water, and the remaining 13 are milk solids. These are butterfat, protein, milk sugar, and minerals. Guernsey and Jersey stock have raised that weight of milk solids to as high as 17.9 pounds per hundred. The portion of butterfat is

¹ Spencer & Johnson, *Price Differentials for Butterfat in Market Milk at page 29.*

readily ascertainable through the Babcock test. The other solids are determined only through long and difficult laboratory processes that cannot practically be applied to daily receipts of milk. It has been proved, however, that those other solids consistently increase to some extent as the butterfat content increases. There is no reason to suppose that consumers receive any more benefit from the water in milk because of its being briefly housed within a cow, than from water on tap. It is what the water bears in solution that is of value. The greater amount of solids in the milk, the greater are the property rights to be recognized.

2. INFRINGEMENT OF THOSE RIGHTS THROUGH EQUALIZATION.

a. *Operation of Plan and its Effect.*

The equalization prescribed in Order No. 27 in its present working has infringed the property rights of the petitioner in its product. Prior to Federal regulation this quality milk commanded a premium. With the advent of equalization, while theoretically the producers of high test milk were not, by the terms of the Order, prevented from charging such a premium, the practical effect was to raise the price to consumers of all milk, to place dealers in a position to handle only such milk as could be sold without premiums additions, and to take away the market for the quality product and to deprive consumers of it.

Upon the requirement that the proceeds from the sale of Guernsey milk be placed with all other milk proceeds in the producer-settlement fund, as a device for equality, the following illustrates the extent to which equalization has impaired the petitioner's returns for its milk; Cows of the

Holstein breed produce 90% of the milk in the market, Guernseys 5%, according to the Secretary's contention in the brief filed in the Circuit Court herein. The evidence before the Secretary showed Holstein milk to average 3.5% butterfat content (R. 104, 108, 307, Ex. 29 and 31) and Guernsey milk 4.75% (Secretary's Findings 4 and 7; R. 104, 108, Ex. 29 and 31). Holstein cows produce one-third more than Guernseys (R. 90, 104, 299-300, 316; Ex. 28, 29, 31). 4¢ per 1/10 of 1% of butterfat for the first 3.5% is equivalent to \$1.40 per hundred pounds of milk (R. 91). The uniform price for September, 1938, the first month of the Order, was \$1.87 per hundred (Ex. 10). The uniform price for January, 1944 was \$3.43 per hundred (Market Administrator's determination). Assuming a herd of Guernsey cows producing 9000 pounds of milk, we should compute that a Holstein herd of the same size and efficiency would produce one-third more, or 12,000 pounds. Using these figures

12,000 lbs. of milk (Holstein) @ \$3.43 (Value of first 3.5% of butterfat included)	\$411.60
9,000 lbs. of milk (Guernsey) @ \$3.43 (Value of first 3.5% of butter fat in- cluded)	\$308.70
Butterfat differential an additional 1.25% of butterfat @ 4¢ per 1/10 of 1% or 50¢ per hundred	45.00
	353.70
Excess compensation received by producers of 3.5% milk	57.90

This represents for each hundred weight of Guernsey milk at $64\frac{1}{3}$ ¢ disadvantage in comparison with low test milk. Thus, "in nominal equality, there may lurk actual inequalities."²

² New York State Guernsey Breeders' Co-Operative v. Noyes, 248 N. Y. 197, at page 203.

b. *Failure of 4¢ butterfat differential to meet expense of producing high test milk.*

(1) Historical background of butterfat differential.

So long as milk has been marketed on the classification price plan, it has been bought and sold by the hundred-weight.

The Babcock test for butterfat in milk was followed 22 years later by price recognition of differences in butterfat. The records of New York dealers in October, 1912, disclose that the Sheffield Farms Company began to pay a premium of 3¢ per hundred pounds of milk testing from 4.0 to 4.5 per cent. The next April Borden's Farm Products Company paid a premium of 10¢ per hundred pounds of milk testing 3.8 or higher. By 1917 both Borden's and Sheffield Farms had adopted a new system of fat differentials, taking 3 per cent as the basis and paying a premium of $3\frac{1}{2}$ ¢ per hundred pounds for each additional 1/10th per cent of fat. In October, 1917, this was raised to 4¢ per point, with 3.5 test as the base. Thus it has remained for more than 25 years on the regular grade of milk.

(2) Arbitrary 4¢ unrelated to production cost or market.

This payment of 4¢ for each 1/10th of 1% of butterfat above 3.5% and deduction of 4¢ for each 1/10th of 1% of butterfat below 3.5% prevailed without deviation when milk sold for 90¢ and \$1.00 per hundred in 1937. It prevails under the Order now, when milk in Class I commands \$3.70 per hundred-weight. Butter has held for 20¢ a pound and 90¢ a pound, but the butterfat differential remains 4¢ per point.

In the meantime, feed, equipment, labor and herd replacements—all of them directly related to the production of milk and representing greater expense in efficient high test milk production than in equally efficient low test milk production—may drop or soar. No one has ever justified the static 4¢ rate.

"The consideration which led to the establishment of the producer butterfat differential at 4¢ per point in New York and some other areas, or at other specified rates in different places, are not recorded."³

But

"* * * so long as violent changes in prices and in costs are a feature of our economy, it is a fundamental error to maintain the butterfat differential at a fixed rate per hundredweight."⁴

(3) Adjustable butterfat differentials in other milk marketing areas.

Recognition that four cents could not be the correct differential nor the equitable one throughout all shifts and changes in costs, has properly persuaded the adoption in other markets of a graduated scale of butterfat premiums to meet in some measure the higher cost of production of high test milk. In Boston and Philadelphia, for example, the Secretary of Agriculture has provided in his orders for a much higher premium for butterfat content—as high as 6.9%. The same considerations move for similar action in the New York market.

B. Plaintiff is therefore entitled to preferential treatment in the order or exemption from equalization.

³ Spencer & Johnson, *supra*, at page 23.

⁴ *Ibid.* at page 29.

1. CONSTITUTIONAL RIGHTS OF MINORITY GROUPS UNDER THE ORDER.

The Constitutional Bill of Rights was designed to safeguard a number of fundamental guaranties beyond the impact of even the most impetuous majorities. In this Order No. 27, the petitioner's,—a minority group's-right of property is violated in distinct disregard of the Constitutional guaranty in the Fifth Amendment. The privilege to vote for or against acceptance of the Order does not preclude the minority's relief from the violation of the Fifth Amendment, since that privilege alone cannot protect minority producers against unlawful exactions which might be voted upon them by majorities.

Stark v. Wickard, . . . U. S. . . . 88 Law Ed. 511.

2. CONSTITUTIONALITY OF THE ACT AND ORDER NO. 27.

The Secretary and the courts below, it is apparent, have been influenced in denying to the petitioner the relief it seeks on this erroneous assumption: the decisions in the United States vs. Rock Royal Cooperative and other cases considering the constitutionality of the Act in its general aspects render the Order in all respects constitutional.

It is not necessary to review the utter confusion in the marketing of milk which demanded Federal regulation in the 1930's. It is generally conceded that such regulation on the whole has been of benefit to producers of milk. But it does not follow that such benefit places every detail of the Order beyond judicial scrutiny.

This Court has been fully aware that particular portions of the Order would require special consideration and at no

time has dealt with the petitioner's claim nor estopped itself from dealing with it.

In *United States v. Rock Royal Cooperative*, 307 U. S. 533, the New York Guernsey Breeders' Cooperative, Inc., was permitted to file a brief *amicus curiae* in which the pendency of this litigation was referred to. The petitioner, while not presuming to urge a decision one way or another upon the questions posed by that case, indicated that problems involved in its litigation with the Secretary might come before this Court. It then requested that nothing be said by inadvertence which might be construed by lower courts as controlling the somewhat different facts of its own case. The Court complied with that request.

Let us consider just what questions of the Act and Order have been judicially treated:

None of the litigants in the Rock Royal case asserted their right to a differential under the Order. They were attacking the Act and the Order in their general aspects—the power of Congress to regulate the marketing of milk; the delegation of authority permitted under the Act, and its jurisdiction over cooperatives. This Court held the Act constitutional and the Order, in its general aspects, a valid order authorized by the Act, an instrument tending to stabilize the market and to correct chaotic marketing conditions.

H. P. Hood & Sons v. United States, 307 U. S. 593, reaffirmed the constitutionality of the act "insofar as similar issues" to the Rock Royal Case were raised.⁵ In *United States v. Whiting Milk Co.*, 21 Fed. Supp. 321, a case later consolidated with the Hood case, the District Court de-

⁵ At page 595.

terminated that many questions remained to be passed upon by this Court.

United States v. Adler's Creamery, 107 Fed. 2d 988, presented the question of subjecting handlers of intrastate milk to the provisions of the Order.

Queensboro Farm Products, Inc., v. Wickard, 137 Fed. 2d 969, dealt with the classification of milk—whether upon the basis of actual utilization or upon the basis of the form in which it was moved from the appellant's plant. The court, in deciding, pointed out that a statute constitutional as to one on a certain state of facts, may be unconstitutional as to another on a different state of facts.⁶

In Waddington Milk Co., Inc., v. Wickard, 140 Fed. 2d 98, matters of classification as between plants were determined.

Stark v. Wickard, U. S. . . . ; 88 Law Ed. 511, arose under the Boston Order, the petitioners, a minority group under the Order, challenging the provision for payments to cooperatives by the Administrators. The Supreme Court upheld the right of the petitioners to a judicial examination of their complaint.

This cooperative is here raising an issue similar to that in Stark v. Wickard—the right to question, and to be relieved from, the provisions of an order which fails to comply with the grant of authority given by the Act.

Despite the decisions favorable to the Act and the Order, therefore, legislation constitutional in its general outlines

⁶ At pages 997-978.

may yet be found to violate constitutional guaranties when considered in relation to facts presented on a subsequent trial by another litigant.

Yick Wo v. Hopkins, 118 U. S. 356.

Abie State Bank v. Bryan, 282 U. S. 765.

Nashville & etc. Co. v. Walters, 294 U. S. 405.

Averne Bay Construction Co. v. Thatcher, 278 N. Y. 222.

3. METHOD OF CORRECTION PRESCRIBED IN THE ACT.

That act itself contemplates the very relief which the petitioner seeks. Agricultural Market Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 608 e 5 (B) (ii) provides for payment to all producers and associations of producers of uniform prices * * * subject * * * to adjustments for (b) the grade or quality. But the Order has failed to grant in respect to the Guernsey Breeders' Association producers a differential "for the grade or quality of the milk" which they deliver.

The brief history of the butterfat differential showed complete absence of any explanation for choosing a fixed 4¢ per 1/10th of 1% of butterfat. It is most likely explained as the figure at which the dealers in the early period of its payment could get by. The bodily adoption of that static figure in the New York orders flaunts the very basis of the Order—that it reflect the market pulse and the producers' expense each varying month. Come high, come low, the part of the milk which gives it value—the butterfat and the proportion of other solids it represents—the part of the milk which is built from feed, careful breeding, and conditioning, is clamped at an unchanging differential. Its effect has been to compensate the producers of low test

milk, that of 3.5%, at a higher rate per point of butterfat than that applicable to milk of higher percentage. The higher the test, the smaller the actual returns per point of butterfat.

This provision in the Secretary's Order directly and largely benefits the majority of the producers at the expense of the minority. It discourages the production of high test milk and tends to reduce the volume of high test milk in the market. It operates in the same manner as if clothing manufacturers were compelled to trim their expenses so that only 15% woolen suits were put on sale.

The opinion of the Circuit Court below, 141 Fed. 2d. 805, recognizes and discusses at some length the 4¢ butterfat differential and construes or seems to construe it as one for "grade or quality" of product. It announces that this differential "necessarily works to plaintiff's advantage, since Guernsey milk has one of the highest butterfat content of any of the milk involved." That court further sanctions the continuance of 4¢ in the Order as pursuant to authority under the Act.

Such conclusions are utterly in error and in immediate need of correction. The 4¢ butterfat differential is not one for grade or quality of product. It is not a recognition of market changes or expense fluctuations. It was not placed in the Order in response to any statutory mandate as adjustment for grade or quality. The court below, however, seized upon it as a panacea and evaded a direct determination and treatment of the petitioner's complaint.

The prices directed to be fixed are those which will give the commodities for which they are established a purchas-

ing power equivalent to their purchasing power during the base period. Any fixing of prices which results in gross inequity between groups of producers, in addition to disregard of the purchasing power, fails to meet the test for proper minimum prices. Any fixing of prices the inevitable result of which is to drive from the market a superior product and to deprive the consuming public of that product fails "to protect the interest of the consumer," (Sec. 602) as well.

4. DUTY OF THE COURT UPON SECRETARY'S FAILURE TO GRANT RELIEF.

The Act, by Sec. 608e (15) (A), recognizing that an obligation imposed under an Order may be contrary to law, supplies a method of review. A person adversely affected by the terms of an order may apply for relief to the Secretary. The decision rendered by him pursuant to that application is subject to judicial review under Sec. 608e (15) (B). Where a decision of the Secretary is "not in accordance with law" a reviewing court may direct the entry of "any designated judgment to which a claimant is constitutionally entitled."

Anniston Mfg. Co. v. Davis, 301 U. S. 337.

The petitioner has failed in its effort to obtain justice and equity at the hands of the Secretary and the courts below. Relying upon what petitioner believes unsubstantial evidence and rejecting credible and substantial evidence, the Secretary has refused to find that petitioner's milk is superior, not only in butterfat, but also in flavor and vitamin A. The lower courts have upheld him. The Secretary refused to recognize as pertinent questions of relative marketability and cost of production. The Circuit Court, despite the pro-

visions of 608c (18), has sustained him by stating that "production costs and marketability are not in themselves factors to influence minimum milk prices."

Petitioner therefore asks that this reviewing court direct that milk prices to be payable to the petitioner reflect properly the grade and quality of its product.

In support of this contention there is at hand the guidance of the New York Court of Appeals, the Court of last resort in the very State wherein this issue has arisen. That Court in New York State Guernsey Breeders' Co-Operative, Inc. vs. Noyes, 284 N. Y. 197, probed this same litigant's attack upon the New York State Orders Nos. 127 and 129, similar to Federal Order No. 27, and found

1. That the Commissioner of Agriculture and Markets had

"the power to grant a differential where it is shown that there exists a distinct difference in production costs, quality or marketability of milk of one breed of cows from that of other breeds" and

2. That it was the

"Commissioner's duty to determine the existence of conditions affecting the equitable application of the proposed order, and to make appropriate modifications shown by the evidence to be necessary."

5. Grant of Relief to the Petitioner as Affecting Milk Production and Marketing

The Circuit Court, in this case, has indicated its assumption that this is a breed issue, a Guernsey versus Holstein conflict.

The breed issue is only an incident to the question before the court. Because petitioner handles only Guernsey milk, and because the Guernsey milk it handles is of the kind so adversely affected by an order which fails to provide compensation for grade or quality, petitioner has been faced with consistent efforts to defeat an otherwise justifiable attempt to obtain equity and justice under the order by accusations that relief is sought for the purpose of promoting the Guernsey breed. We ask the court to view the problem as one involving grade and quality of product divorced from any question of breed superiority or inferiority.

The Secretary has contended that a recognition of the petitioner's claim in the Order would impede the effective control of milk marketing. It must be conceded, in answer, that the payments made by the Guernsey Breeders to the Court, instead of to the equalization fund, for a period of nearly six years, have not manifestly injured the Secretary's administration of Order 27. The amount is of little significance to all the producers as a body. Judge Cooper, U. S. D. J., Northern District of New York, in an unreported decision herein, in discussing this phase of the question, said:

"The amount demanded from the plaintiff for the equalization fund will only increase the price of other producers by less than one mill per hundredweight of milk per day."

Even should the sum be substantial, it is unlikely that proper differentials to the petitioner should confound the administration of the Order, unless it be ascertained that those who stand to benefit by the inequitable distribution now directed by the Secretary, are so intent upon their gain that they would undertake to wreck the Order to prove their point.

Conclusion.

For the reasons stated at pages 7-9 of this petition and brief, supported by the discussion of relevant decisions, it is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted.

Pulaski, N. Y., July 17, 1944.

MERRITT A. SWITZER,
Attorney for Petitioner,
Office and Post Office Address,
Post Office Building,
Pulaski, New York.

IRVING G. HUBBS,
MILO R. KNIFFEN,
of Counsel.